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TAKING THE SUPREME COURT AT ITS WORD: THE IMPLICATIONS FOR RFRA AND SEPARATION OF POWERS

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"The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[**]

I. INTRODUCTION

By enacting the Religious Freedom Restoration Act of 1993, (RFRA or the Act) Congress has set the stage for a profound reexamination of the legislative role in protecting individual liberties. When President Clinton signed RFRA on November 16, 1993, he stated that "this act reverses the Supreme Court's decision in *Employment Division v. Smith*[1] and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion."[2]

RFRA is intended to guarantee greater protection for religious freedom than the *Smith* Court has been willing to provide under the Free Exercise Clause of the First Amendment. However, neither Congress nor the courts currently applying RFRA[3] have fully considered the tension between RFRA and the doctrine of separation of powers.

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** INS v. Chadha, 462 U.S. 919, 951 (1983) (one-house legislative veto provision violates separation of powers).

1. 494 U.S. 872 (1990) (denying free exercise claim of Native Americans involving religious use of peyote).

2. Religious Freedom Restoration Act Signing Ceremony, Fed. News Service (Nov 16, 1993).

3. At present, there are more than forty reported decisions involving RFRA. Two of these address the constitutionality of the Act; neither decision reaches a conclusion on the matter. Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994) (not resolving constitutional issue because plaintiffs entitled to prevail even under *Smith* standard); Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994) (noting that RFRA claim could have been brought and that congressional power to enact the statute has been questioned).

I will argue that RFRA violates the separation of powers doctrine—not simply because it "reverses" the Supreme Court on an issue of constitutional interpretation—but more precisely because it undermines the most fundamental power held by any branch of government: the power to determine its own limitations. *Smith* is not merely a decision in which the Court chose to abandon the compelling interest test as the standard for enforcing the constitutional guarantee of free exercise. *Smith* questions the institutional competence of the judiciary and sets forth the vision of a majority of the Court regarding the limits of the judicial function. Because *Smith* represents the Court's reasonable (although not fully articulated) refusal to undertake the task of balancing religious liberties against neutral government regulations, Congress cannot override that refusal through ordinary legislation.

II. A BRIEF LEGISLATIVE HISTORY OF RFRA

The Religious Freedom Restoration Act was introduced in the 101st Congress on July 25, 1990, by Congressman Solarz,[4] just three months after the Supreme Court's decision in *Smith*. In its original form, RFRA prohibited the government from restricting any person's free exercise of religion. An exception was provided if:

> (1) the restriction—
> (A) is in the form of a rule of general applicability; and
> (B) does not intentionally discriminate against religion or among religions; and
>
> (2) the governmental authority demonstrates that application of the restriction to the person—
> (A) is essential to further a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.[5]

While testimony was heard on this initial version of the Act, it did not emerge from the House Judiciary Committee during the 101st Congress. The Senate version, introduced on October 26, 1990,[6] similarly languished in the Senate Judiciary Committee. There were few if any significant differences between the

4. H.R. 5377, 101st Cong., 2d Sess. (1990).
5. *Id.* § 2(b).
6. S. 3254, 101st Cong., 2d Sess. (1990).

House and Senate versions of the bill.[7]

RFRA was reintroduced in the 102d Congress on June 26, 1991. This version of the bill differed considerably from its earlier incarnation. The new House Bill 2797 contained a section entitled "Congressional Findings and Declaration of Purposes," consisting of five findings of facts and two definitive statements of purpose.[8] No basis for these factual findings appears in the legislative record. Rather, they appear to be drawn from the remarks of one senator and an academic witness who submitted several letters and testified in support of the Act.[9]

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7. The Senate version uses the term "government" whereas the House bill refers to "governmental authority." *Id.* § 2(a); H.R. 5377, *supra* note 4, § 2(a). Also, the Senate version expanded section (b)(1) to refer to "an otherwise valid statute, ordinance, or other form of rule of general applicability or action taken to enforce such a rule," while the House version referred only to restrictions that are "in the form of a rule of general applicability." S. 3254, *supra* note 6, § 2(b)(1)(A); H.R. 5377, *supra* note 4, § 2(b)(1)(A).

8. H.R. 2797, 102d Cong., 2d Sess. (1991).

(a) FINDINGS.—The Congress finds—

(1) the framers of the American Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not burden religious exercise without compelling justification;

(4) in Employment Division of Oregon v. Smith the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder is a workable test for striking sensible balances between religious liberty and competing governmental interests.

(b) PURPOSES.—The purposes of this Act are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is burdened; and

(2) to provide a claim or defense to persons whose religious exercise is burdened by government.

Id. § 2.

9. The Senate version of the Bill, S. 2969, contained the same Findings and Purposes. Findings 2-5 could have been taken from the remarks of Senator Biden, when the bill was introduced the previous year, or from various letters submitted by Professor Laycock. *See* H.R. 2797, *supra* note 8, § 2(a)(2); S. 3254, *supra* note 6, § 2; *Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 72-78 (1990) [hereinafter *1990 Hearings*] (Appendix 3—Letter to Chairman Don Edwards from Douglas Laycock, Alice McKean Young Regents Chair in Law, School of Law, University of Texas at Austin). Professor Laycock renewed

In addition to new factual findings, the substantive provisions of the bill were modified. Rules of general application that burdened religious exercise were no longer singled out as presumptively permissible.[10] Instead, House Bill 2797 prohibited all laws that burdened religion, whether generally applicable or otherwise, unless the government could demonstrate that the restriction was essential to further a compelling interest, which was in turn achieved by the least restrictive means possible.[11] This version of the Act contained the most stringent version yet seen of the compelling interest test—a version that was certainly more religion-protective than anything the Court had utilized prior to *Smith*.[12]

Hearings were held on the Act on May 13-14, 1992.[13] Thirteen witnesses testified, five of whom voiced reservations about the bill as currently drafted. Witnesses supporting the enactment of RFRA included Professor Douglas Laycock, Congressman Stephen J. Solarz (who had first introduced the bill) and Ms. Nadine Strossen of the ACLU.

Much of the testimony focussed on RFRA's possible effects on a woman's right to obtain an abortion. This was the principal area of concern to the Act's opponents.[14] Another issue was RFRA's potential to undermine favorable tax treatment and public funding for religiously affiliated groups.[15] These concerns resulted in a competing bill, entitled the Religious Freedom Act. This bill was introduced on November 26, 1991. It was identical to RFRA except that it specifically disclaimed any effect on abortion services or funding, the tax status of any person, and the use or disposition of government funds or property obtained from

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these recommendations regarding legislative findings of fact in subsequent hearings on RFRA. *See Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 334, 357 (1992) [hereinafter *May 1992 Hearings*]; *Religious Freedom Restoration Act: Hearings on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 129 (1992) [hereinafter *Sept. 1992 Hearings*].

10. H.R. 2797 provided that "Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." H.R. 2797, *supra* note 8, § 3(a).

11. *Id.* § 3(b).

12. *Compare* H.R. 2797, *supra* note 8, § 3(b) *with* Sherbert v. Verner, 374 U.S. 398, 406-07 (1963); Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972).

13. *See May 1992 Hearings*, *supra* note 9.

14. The concern here was that RFRA might provide a foundation for a woman's right to abortion that was not dependent on Roe v. Wade. Professor Laycock convincingly rebutted this theory. *See May 1992 Hearings*, *supra* note 9, at 347-50.

15. Professor Laycock has also refuted these objections to RFRA. *See May 1992 Hearings*, *supra* note 9, at 350-51.

tax revenues.[16]

Professor Laycock and Professor Ira C. Lupu provided the central testimony on RFRA's constitutional status. Professor Lupu argued that RFRA could be found unconstitutional as applied to the states[17] because the Act exceeded Congress' authority to enforce the Fourteenth Amendment[18] and was not clearly supported by either Congress' spending power or its power to regulate commerce.[19]

Professors Lupu and Laycock were the only witnesses to discuss the "institutional" aspect of *Smith*, on which this article relies. Professor Lupu framed the issue as follows:

> Alternatively . . . *Smith* may represent an entirely institutional rather than substantive judgment about the force of the free exercise clause. A significant portion of the Court's justification in *Smith* focusses on the difficulties encountered by courts in balancing interests in the fashion required by the pre-*Smith* law. The opinion suggests that only the political branches possess the requisite competence and authority to make these judgments.
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> . . . The "institutional" view suggests that courts, in the absence of focused legislative judgments about the impact of religious concerns on governmental ones (and *vice versa*), should not engage in the unpredictable business of assessing incommensurables like religious liberty and government need.

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16. H.R. 4040, 102d Cong., 1st Sess., § 3(c)(2) (1991). Mention was made during the testimony that an amendment had been proposed to H.R. 2797 by Senator Hyde that embodied the three exceptions from the Religious Freedom Act; the actual text of those amendments does not appear in the legislative history of RFRA.

17. This argument was also made by Bruce Fein. *See Sept. 1992 Hearings*, *supra* note 9, at 121-28.

18. Other witnesses also addressed the issue of whether RFRA exceeded Congress' power to enforce the guarantees of the Fourteenth Amendment. *See, e.g.*, *1990 Hearings*, *supra* note 9, at 54 (statement of John H. Buchanan, Jr.); *May 1992 Hearings*, *supra* note 9, at 51, 99-100 (statement of Senator Hyde), at 100 (statement of Nadine Strossen); *Sept 1992 Hearings*, *supra* note 9, at 116 (statement of Bruce Fein), at 92-97 (statement of Professor Laycock).

19. Professor Lupu argued that RFRA exceeded Congress' authority for three reasons. First, the Act required the states to move in a direction that is sharply opposed to the direction required by the Court. According to Professor Lupu, Congress can enforce individual liberties not protected by the Court only when Congress and the Court are moving in the same direction, and Congress's position is not markedly different from the Court's. Second, Congress can pass laws that reach beyond the Court's decisions when Congress acts pursuant to its special competence to find legislative facts. However, this source of legislative authority is not available to Congress because RFRA is not based on Congress' factfinding powers. Third, RFRA is flawed because the states and the federal government are not treated alike, and the states are subject to greater restrictions. *See May 1992 Hearings*, *supra* note 9, at 372-95 (statement by Professor Ira C. Lupu).

> The converse proposition, which *Smith* endorses, is that courts should accept such focussed legislative judgments when they in fact are made.[20]

The problem with RFRA, as Lupu then pointed out, is that it is not a "focussed legislative judgment" relating to a particular religious practice or government regulation. RFRA is a generalized religious freedom statute that requires courts to apply the compelling interest test rejected by *Smith*.

Professor Lupu conceded that RFRA does not supply the Court with any new "institutional apparatus" to make judgments involving the compelling interest test. He viewed the statute as an authoritative pronouncement by a coordinate branch that courts should be making such judgments in order to preserve religious liberty.

Professor Laycock also discussed the institutional dimension of *Smith* and its implications for RFRA. In his first letter to Congress, dated October 3, 1990, he noted:

> The Supreme Court's reason for not requiring government to justify all burdens on religious practice is institutional. The opinion is quite clear that the Court does not want final responsibility for applying the compelling interest test to religious conduct. The majority does not want a system "in which *judges* weigh the social importance of all laws against the centrality of all religious beliefs."[21]
>
> These institutional concerns do not apply to the Religious Freedom Restoration Act. Congress, rather than the Court, will make the decision that religious exercise should sometimes be exempted from generally applicable laws. And Congress, rather than the Court, will retain the ultimate responsibility for the continuation and interpretation of that decision.
>
> Of course the courts would apply the compelling interest test under the Act, and these decisions would require courts to balance the importance of government policies against the burden on religious exercise. But striking this balance in the enforcement of a statute is fundamentally different from striking this balance in the independent judicial enforcement of the Constitution. Under the statute, the judicial striking of the balance is not final. If the Court strikes the balance in an unacceptable way, Congress can respond with new legislation.[22]

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20. *May 1992 Hearings*, *supra* note 9, at 391-92.

21. Emphasis added by Laycock; citation to *Smith* omitted.

22. *1990 Hearings*, *supra* note 9, at 77-78 (Appendix 3—Letter to Chairman Don Edwards from Douglas Laycock); *see also May 1992 Hearings*, *supra* note 9, at

The testimony of Professors Laycock and Lupu demonstrates that Congress was aware of *Smith*'s institutional implications when it enacted RFRA. However, both witnesses downplayed the force of the Court's institutional argument. Professor Lupu argued that the Court's views regarding the respective competence of the judicial and legislative branches created a problem for RFRA, but that the problem was "manageable."[23] Professor Laycock found that the Court's institutional concerns did not apply to RFRA, both because Congress was providing the authority for free exercise exemptions and because Congress retained the power to modify judicial applications of the statute.

Neither Professors Lupu nor Laycock are willing to take the Court's institutional argument seriously. This article contends that the Court's institutional rhetoric must be carefully considered and its implications duly weighed, if only because the assumptions that underlie that rhetoric provide the best defense for the *Smith* decision. This article concludes that the institutional argument, extended to its full scope, raises grave doubts as to the constitutionality of RFRA.

To briefly summarize the remainder of RFRA's legislative history: On March 11, 1993, the bill was reintroduced in the 103d Congress as House Bill 1308. This final version of the statute contained the same legislative findings of fact and statements of purpose as House Bill 2797. Eight different versions of this bill were considered during the 103d Congress; the variances involved in these competing versions need not be considered here.

House Bill 1308 eventually became Public Law No. 103-141: the Religious Freedom Restoration Act of 1993. The final version of the statute contained minor modifications of the previous legislative findings of fact and purposes[24] and significantly soft-

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358-59; *Sept 1992 Hearings*, *supra* note 9, at 96-97.

23. *May 1992 Hearings*, *supra* note 9, at 392. Lupu finds that the institutional problem is manageable for two reasons: first, because RFRA provides the Court with an authoritative basis for applying the test; and second, because courts are familiar with the compelling interest test from other areas of constitutional law. *May 1992 Hearings*, *supra* note 9, at 393.

24. Finding number 5 was modified to read: "[T]he compelling interest test as set forth in prior [f]ederal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(2)(a)(5) (Supp. V 1993) (emphasis added) Purpose number 1 was modified to provide: "The purposes of this Act are—(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free

ened the compelling interest test. As enacted, RFRA provides:

> (b) Exception.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[25]

The final version of the compelling interest test closely tracks the Court's use of that standard prior to *Smith*.[26] If Congress had significantly modified the compelling interest test or enacted a different standard than the Court rejected in *Smith*, there might be an argument that Congress had been responsive to the Court's institutional concerns. However, as this brief legislative overview demonstrates, that is not what Congress did. RFRA directs the judiciary to apply the same compelling interest test in statutory free exercise cases that the Court rejected in *Smith* as unsuited to the judicial competence.

I agree with Professors Laycock and Lupu that the Court's most coherent explanation for *Smith* is institutional: a belief that the judiciary is unsuited to decide when religious claimants are entitled to exemptions from neutral laws. I differ with them by concluding that RFRA fails to take account of the Court's institutional concerns. RFRA denies the validity of the Court's institutional claim by assuming judicial competence in the face of a prior contrary assertion. Congress did not investigate the validity of the Court's claim, did not discuss or deliberate upon that issue and the statute does not reflect the traditional process of legislative factfinding.[27] RFRA requires the courts to implement

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exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(2)(b)(1) (Supp. V 1993).

25. 42 U.S.C. § 2000bb(3)(b).

26. RFRA thus uses Supreme Court precedent as a standard to guide judicial interpretation rather than as a precise, detailed rule of decision. Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 18-19 (1993). Various authors have discussed the difference between rules and standards. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689-90 (1976); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

27. I am not persuaded that the presence of any of these factors would cure RFRA's separation of powers problem. However, their absence does tend to demonstrate that Congress did not seriously consider the institutional argument after hearing testimony on that issue.

a standard that the Supreme Court has deemed inconsistent with the judicial function. This violates the principle of separation of powers.

Professor Laycock pointed out in his letter to Congress that any judicial decisions which strike an inappropriate balance under RFRA can be corrected, since Congress can always amend the statute.[28] He concludes that there is a difference between the responsibility of the courts in enforcing RFRA and their role in applying the compelling interest test pursuant to the constitutional guarantee of free exercise. He further finds that the difference is sufficient to assuage the Court's institutional concerns.

I disagree with Professor Laycock's third proposition. This article will attempt to demonstrate that the very real differences between enforcing a statute and enforcing the Constitution do not mitigate RFRA's separation of powers problem. *Smith* does not reflect judicial fears of "soloing" without congressional oversight. The majority in *Smith* did not refuse to apply the compelling interest test because of a perceived lack of constitutional or congressional authorization. Instead, the Court expressed a reasoned refusal to balance claims of religious liberty against neutral and generally applicable laws. RFRA is constitutionally infirm because it ignores judicial concerns related to institutional competence and because it is not supported by either reasoned grounds for contradicting the Court's institutional judgment or traditional legislative factfinding.

III. RFRA AND SEPARATION OF POWERS

RFRA violates separation of powers because it disregards the institutional concerns that are the only intelligible basis for the *Smith* opinion. RFRA requires courts to balance the importance of neutral and generally applicable laws against the burden those policies impose on religious exercise—a task *Smith* strongly suggests that judges are unsuited to perform.

As noted in Part II, this institutional argument was considered in congressional hearings on RFRA but was dismissed. Based on the limited discussion, it appears that Congress determined that enactment of RFRA was an act of joint involvement and co-responsibility by a coordinate branch sufficient to assuage the Court's institutional concerns. This was the theory propounded, in slightly different forms, by Professors Laycock and Lupu.

28. *See supra* text accompanying note 22.

Both argued that the Court's concern with institutional competence could be remedied, at least in part, by a grant of legislative authority. Professor Lupu compared *Smith* to the Court's prudential limits on justiciability, which he viewed as entirely subject to congressional modification.[29]

The difficulty with this argument is that the concepts of authority and institutional competence are not coextensive. *Finley v. United States*[30] clearly rests on the authority rationale. In *Finley*, Justice Scalia refused to allow federal courts to exercise jurisdiction over pendent parties, finding no authority for such jurisdiction in Article III of the Constitution. Congress responded to *Finley* by enacting the Judicial Improvements Act of 1990,[31] which, *inter alia*, provides that federal courts *must* exercise jurisdiction over pendent parties when certain requirements are met.[32]

The Judicial Improvements Act of 1990 raises no separation of powers problem. The jurisdiction of federal courts is limited by both the Constitution and acts of Congress. *Finley* failed to locate any authority in Article III or in the Federal Tort Claims Act[33] for the exercise of a federal court's jurisdictional powers and explicitly invited Congress to fill that gap. Congress responded by supplying that authority. What distinguishes *Finley* from *Smith* is that *Finley* never questioned a judge's capacity to resolve claims involving pendent parties. There was no issue of judicial competence in *Finley*. It was purely and simply an authority case.

Smith, on the other hand, contains no requests for congressional authorization and a great deal of rhetoric about the limits of judicial competence. While the majority weakly claimed that neither the Constitution nor the precedent required the application of the compelling interest test, those assertions have been powerfully refuted.[34] What remains troubling and little dis-

29. *See May 1992 Hearings*, *supra* note 9, at 393 (arguing that "such an expression by Congress would be analogous to those on which courts at times rely on matters of justiciability").

30. 490 U.S. 545 (1989).

31. 28 U.S.C. § 1367 (Supp. II 1990).

32. Specifically, the claim must arise out of a common nucleus of operative facts such that both claims would ordinarily be tried in a single judicial proceeding. The term "supplemental jurisdiction" is now used to describe pendent and ancillary claims and parties. 28 U.S.C. § 1367(a).

33. 28 U.S.C. § 1346(b).

34. For excellent critical analysis of the Court's misuse of both constitutional precedent and the historical record, see e.g., James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free*

cussed is the Court's expression of institutional incompetence, which seems to reflect a different concern than the alleged lack of constitutional authority.

Smith has been criticized for the majority's reliance upon the results obtained from application of the compelling interest test rather than the constitutional language and precedent.[35] But the Court's result-oriented language should alert the reader that the nature of the argument has changed. An argument is now being made that depends on neither the Constitution nor precedent. Application of the compelling interest test in the free exercise context is deemed unworkable. The majority says: "[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[36]

Like a high school drum major, Scalia struts out with a "parade of horribles" to illustrate the breadth and scope of judge-mandated exemptions that could be required if the compelling interest test is rigorously applied.[37] Rigorous application would permit religious claimants to become a "law unto themselves," possessed of a private right to ignore generally applicable laws.[38] Though many would disagree, this result is presented as self-evidently undesirable.

Limited application of the compelling interest test is equally unacceptable to the Court. First, any effort to "water down" the compelling interest test is likely to undermine the protection it provides in other areas of the law, such as speech or equal protection.[39] The Court is unwilling to establish a precedent for diluting the test in those contexts, choosing instead to abandon use of the test in free exercise cases. The majority then finds that any effort to mitigate the harsh results produced by rigorous application of the compelling interest test would place courts in the position of passing judgment on the centrality of the religious practices burdened by government action. The Court concludes that such determinations are not an appropriate exercise of the judicial function.[40]

Exercise, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

35. *See supra* note 34.

36. *Smith*, 494 U.S. 872, 889 n.5 (1990).

37. *Id.* at 888-89.

38. *Id.* at 879, 885-86 (citing Reynolds v. United States, 98 U.S. 145, 167 (1879)).

39. *Id.* at 888.

40. *Id.* at 887.

The Court's concern about judicial inquiries into centrality is far from speculative. While the academy's view of a centrality requirement has been overwhelmingly negative,[41] courts have limited the compelling interest test by restricting its use to cases where the government burdens "central" aspects of religious practice.[42] Scalia observes that there is no reasoned standard that would enable judges to determine which practices are central to any religion.[43]

The institutional concerns raised in *Smith* would be stronger if the Court had explicitly discussed the choices judges must make in the course of applying the compelling interest test. First, the judge must decide whether the challenged policy actually burdens the claimant's free exercise of religion. Plaintiffs cannot demonstrate a "burden" by mere allegations; such a rule would open the courts to a wide assortment of spurious claims. In attempting to ascertain the existence and extent of a burden, judges have resorted to notions of sincerity and centrality, a practice that risks undue judicial intrusion into matters of religious conscience and practice.[44]

Once a burden has been demonstrated, the judge must determine precisely what goals are served by the state's policy, their respective importance, and the extent to which the state's goals would be undermined if a free exercise exemption were

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41. *See, e.g.*, Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 958-59 (1989) (arguing that centrality fails as a device for separating constitutionally significant burdens from their less significant counterparts). For an early defense of centrality, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 862-64 (1st ed. 1978).

42. The Supreme Court has never adopted a "centrality" test. However, in Lyng v. Northwest Cemetery Protective Ass'n, 485 U.S. 439 (1988) (upholding government logging operations over free exercise claim of Native Americans), Justice Brennan dissented, arguing that the test should be whether the government's actions posed a "substantial and realistic threat" to "central" aspects of the plaintiff's religion. *Id.* at 475. Justice Brennan found the claimants were entitled to prevail under this standard. *Id.* at 476. For an earlier application of a centrality analysis, see California v. Woody, 394 P.2d 813 (Cal. 1964).

43. *Smith*, 494 U.S. at 886-87 & n.4. Professor Laycock makes light of this concern. He says that Scalia's argument, taken literally, suggests that courts cannot tell the difference between throwing rice at a wedding and taking communion. Laycock says that this is a distinction the courts "can handle." Of course, one easy example does not demonstrate that centrality is either a workable principle or an appropriate subject of judicial inquiry. Professor Laycock appears to concede this, since he rejects the use of centrality in free exercise analysis. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 32.

44. For a thoughtful exposition of the burden requirement, see Lupu, *supra* note 41.

granted.[45] As has been noted in another context, decisions of this sort require both empirical guesswork and delicate computations of tradeoffs. Claimants may have free exercise rights, but are not entitled to their choice of remedy.[46] Judges must consider how many similarly situated claimants are likely to demand exemptions in order to predict the government's costs in administering such exemptions.[47] *Smith* assumes by its rhetoric, without developing the argument, that these determinations strain judicial competence to the breaking point.[48]

In short, *Smith* warns us that application of the compelling interest test in the free exercise context places courts in the position of making arbitrary and unprincipled choices.[49] Because it is the application of the compelling interest test that creates the institutional difficulty, the judiciary's task does not suddenly become manageable because Congress can step in to correct egregious misapplications. It is difficult to escape the conclusion that *Smith* is not a decision about authority: jurisdictional, constitutional or otherwise. It is a decision grounded in the Court's somewhat inchoate concerns about institutional limitations. RFRA disregards those concerns and directs the Court back to the task of balancing religious liberty against facially neutral laws. The Court has signalled both its unwillingness and incapacity to strike that balance. Accordingly, it makes no difference whether the balance is to be struck pursuant to the Constitution or a federal statute.

Some have argued that because the Court routinely applies some version of the compelling interest test in other contexts, including free speech and equal protection claims, the *Smith* majority's reluctance to apply the same test in the free exercise context lacks credibility.[50] There are three responses to this argument. First, an argument that depends on the disingenuousness of the Court is inherently troubling. It is one thing to criticize *Smith* for its unpersuasive use of precedent.[51] It is another to bring charges of mendacity. Since Court observers cannot know when members of the Court are being less than

45. *Id.* at 950.
46. *Id.* at 951.
47. *Id.* at 950.
48. *Smith*, 494 U.S. at 886-87.
49. *Id.* at 882-90.
50. *See* Laycock, *supra* note 43, at 30-33.
51. *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308-09 (1991).

forthright, the stature of the Court demands a presumption of candor.

Second, this argument denies the right of the Court to determine its own institutional competence. The point is that if the Court is willing (and thus presumably competent) to apply the compelling interest test to balance governmental and individual interests in speech, equal protection and other areas, then the Court must be competent to do so in free exercise cases. But *Smith* reviews the precedents applying the compelling interest test and concludes that the Constitution does not require judges to perform a task for which they are unsuited: applying the compelling interest test to facially neutral laws that burden religious exercise.[52] Both Congress and the academic community may disagree with that assessment and challenge the reasons proffered by the Court. But I do not believe that Congress may, without usurping the Court's prerogative, find as a matter of legislative fact that courts *are* competent to apply the compelling interest test to facially neutral laws that burden free exercise rights when the only change since *Smith* is that courts are acting pursuant to a federal statute rather than the Constitution.

Third, there are legitimate grounds for differentiating the application of the compelling interest test in religious liberty cases from its application in other contexts. Nuisance actions, for example, require the courts to balance the respective rights of individuals or corporate entities. This is historically the type of dispute over which courts have special expertise.[53] RFRA claims, on the other hand, pit the government's interest in enforcing facially neutral rules against the rights of individuals and religious groups to obtain exemptions. These cases force courts to make difficult and far-reaching predictions about a number of difficult issues, including the degree of hardship on religious practices and the future effect of exemptions on government enforcement efforts and policy development.[54] *Smith* concludes that such determinations are better suited to the legislature than the judiciary.[55] By enacting a generalized religious freedom statute rather than a specific array of religious-based exemptions, Congress refused to assume legislative responsibility

52. *Smith*, 494 U.S. at 882-90.

53. COUNCIL ON THE ROLE OF THE COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY 101-20 (Lieberman ed., 1984) (discussing the parameters of judicial competence).

54. *See supra* text accompanying notes 43-48.

55. *Smith*, 494 U.S. at 890.

for striking the balance, and simply lobbed the ball back to the courts.

The persuasiveness of the Court's view that such determinations should be made by the legislature rather than by courts is questionable.[56] However, the Court's *power* to make decisions based on this line of reasoning cannot be doubted. Each branch of government has the inherent power to determine its own limitations. Such determinations, when not amounting to abdication of an essential function, are binding on the other branches.[57]

Judicial rulings that rest on institutional concerns deserve the respect of a serious hearing. It is not enough to argue that the Court's concerns are unfounded or demonstrate a lack of fidelity to the judicial obligation to enforce the Constitution. The Court in *Smith* does not refuse to enforce the Free Exercise Clause; it adopts a neutrality principle with which to do so.[58] That neutrality principle has since been applied to strike down city ordinances that discriminate against a particular religion.[59] *Smith* restrictively defines the scope of free exercise rights upon the ground that judges lack competence to apply the compelling interest test when neutral laws are challenged on religious grounds.

Justice Scalia offers only a brief justification in *Smith* for distinguishing the use of the compelling interest test in speech and equal protection cases from its use in free exercise challenges to neutral laws:

> [U]sing [the compelling interest test] as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.[60]

Once again, this rather conclusory observation could have been persuasively developed. Arguably, neither equal protection

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56. For an argument that such decisions can and should be made by the courts, see Lupu, *supra* note 41, at 966-77.

57. Discussion of these boundaries is provided in Section VI of this article.

58. *Smith*, 494 U.S. at 876-82.

59. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) (striking down city ordinances prohibiting the religious sacrifice of animals).

60. *Smith*, 494 U.S. at 885-86. (citations omitted).

nor free speech cases tax judicial competence like free exercise claims. In the speech cases, the Court has distinguished between commercial and political speech; denied protection to obscenity and fighting words; developed the time, place and manner doctrine; and generally created a coherent structure for classifying speech claims prior to the point at which the application of the compelling interest test is required. In fact, the preliminary classification determines the extent of constitutional protection available.

Similarly, the jurisprudence of equal protection is structured around initial determinations of whether or not a fundamental right has been abridged and whether the challenged classification involves a suspect or quasi-suspect class. These initial determinations raise none of the difficulties inherent in judicial inquiries into the sincerity of religious belief, or the extent of the burden imposed upon religious practices. The preliminary inquiries also serve to limit the group of potential plaintiffs entitled to the protection of the compelling interest standard.

On a more fundamental level, Justice Scalia may have been arguing that legal reasoning is simply inadequate to address and evaluate the merit of spiritual claims. This concern goes beyond the fear of judicial insensitivity to nontraditional religious practices and recognizes that religion and law belong to completely different traditions. Religion encompasses the mystic, spiritual aspects of human nature, while law answers to the less esoteric demands of logic and tradition. By this reasoning, any attempt to measure the worth of a religious claim by the yardstick of rational argument and precedent is doomed to fail.

This may be—it is difficult to predict with any certainty—the animating force behind Scalia's rhetoric in *Smith*. The argument would be that it is impossible for judges to fairly balance public policy concerns against religious interests. Such an undertaking is inherently demeaning to religion, both because the process of balancing tends to equate spiritual and temporal concerns, and because the techniques and structures of the legal system are ill-suited to comprehend the religious perspective.

At any rate, one can disagree with Scalia's conclusion, and reasonable minds can differ about the grounds for his position.[61] But the fact remains that a majority of the Court has made a considered determination that use of the compelling interest test in the free exercise context produces results that are arbitrary

61. *See supra* note 34.

and thus socially undesirable. On that basis, the Court has determined that continued use of the compelling interest test in the free exercise context is not an appropriate exercise of the judicial power.[62]

Congress could have responded to *Smith* in a variety of ways. Congress could have amended all federal laws regulating illegal narcotics to mandate an exemption for the religious use of peyote.[63] Congress could have passed a religious freedom statute based upon traditional legislative factfinding that exempted specific religious practices from facially neutral laws.[64] Exemptions could be legislatively mandated in cases involving Social Security withholding,[65] military attire,[66] conscription,[67] and prisoner's rights,[68] despite Supreme Court decisions to the contrary.

The Religious Freedom Restoration Act, however, is not a permissible congressional response to *Smith*. Congress simply lacks the constitutional authority to reverse the Court on issues of judicial competence. RFRA presumes that application of the compelling interest test to resolve religious objections to neutral and generally applicable laws is within the judicial competence. *Smith* strongly suggests that it is not. Courts must have the power to make that assessment; thus, RFRA violates separation of powers by denying the Court's right to determine its own limitations.

IV. SEPARATION OF POWERS AND THE CONSTITUTION

Most separation of powers decisions turn upon the Court's

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62. *Smith*, 494 U.S. at 882-90.

63. This was the Oregon Legislature's response to *Smith*. In fact, some federal narcotics laws currently provide an exemption for the religious use of peyote. *See, e.g.*, 21 U.S.C. § 812, Sched. I (c)(12); 21 C.F.R. § 1307.31 (1994).

64. Religious exemptions from neutral laws have been upheld against establishment clause challenges. *See* Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding exemption from Title VII for religious corporations).

65. *See* United States v. Lee, 455 U.S. 252 (1982) (denying Amish a free exercise exemption from paying social security taxes).

66. *Compare* Goldman v. Weinberger, 475 U.S. 503 (1986) (refusing to invalidate military rules preventing Orthodox Jewish officer from wearing yarmulke with his uniform) *with* 10 U.S.C. § 774(b) (1988) (religious apparel may be worn with military uniforms so long as it is "neat and conservative").

67. *See* Gillette v. United States, 401 U.S. 437 (1971) (denying conscientious objector status to Catholic who believed Vietnam War was "unjust" because objector was not a complete pacifist).

68. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (approving prison's refusal to excuse inmates from work to attend worship services).

interpretation of a core constitutional provision. The justiciability cases tend to invoke Article III,[69] cases involving the executive prerogative may interpret Article II,[70] and cases dealing with the scope of the legislative power unsurprisingly turn on Article I.[71] Other decisions have framed the issue as whether one branch has attempted to exercise powers reserved to another.[72] A separation of powers argument based on the institutional claim in *Smith* may appear somewhat novel due to its apparent lack of a constitutional pedigree. After all, the majority's statements about institutional competence in *Smith* were offered in passing and not supported by reference to the Constitution.

Since *Smith* does not invoke the Constitution to buttress its findings on the institutional competence issue, it may be argued that—like the prudential limits the Court places on justiciability—the institutional competence aspect of *Smith* is subject to congressional reversal. This argument should be rejected for several reasons.

First, the institutional argument that Scalia makes in *Smith* can easily be reframed as a justiciability argument. Scalia finds that judges cannot apply the compelling interest test to determine whether religious claimants should be exempt from facially neutral laws because that test gives judges no opportunity to act

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69. *See, e.g.*, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (citizen suit provisions of Endangered Species Act conflict with Article III); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (Bankruptcy Reform Act of 1978 violates Article III insofar as it authorizes the jurisdiction of non-Article III judges over civil proceedings); Muskrat v. United States, 219 U.S. 346 (1911) (statute purporting to authorize suit by nonadverse parties violates Article III); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (striking down statute that provided rule of decision in particular cases as violative of Article III); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Judiciary Act of 1789, by purporting to expand the original jurisdiction of the Supreme Court, violates Article III); *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (striking down statute that provided executive or legislature power to review judicial decisions).

70. *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (independent counsel provisions of Ethics in Government Act do not violate the appointments clause); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (portions of Federal Election Commission Act violate the appointments clause, Article II, § 2).

71. *See, e.g.*, Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (striking down one-house legislative veto provision in Immigration and Nationality Act as violative of Article I, § 7).

72. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989) (creation of U.S. Sentencing Commission, an independent body within the judicial branch that performs legislative duties, does not violate separation of powers); Bowsher v. Synar, 478 U.S. 714 (1986) (Gramm-Rudman-Hollings Act of 1985 violates separation of powers because it requires the Comptroller General, an officer answerable to Congress, to perform executive functions).

judiciously. Either all religious claimants prevail, or the Court must winnow the claimants out on the basis of inappropriate inquiries into centrality or other ineffective criteria. Scalia's argument can be reduced to the proposition that the compelling interest test, in the free exercise context, is not a judicially manageable standard for resolving these cases. Lack of judicially manageable standards is a traditional ground for holding that the dispute is nonjusticiable, and thus not a "case or controversy" within the Article III jurisdiction of the courts.[73]

In the alternative, the Court's institutional argument may prove to have a foundation in the Establishment Clause. Given the current state of uncertainty surrounding the Court's establishment jurisprudence,[74] it is not surprising that the *Smith* majority sidestepped this issue. But it has been widely acknowledged that judicial decisions providing religious plaintiffs with exemptions from facially neutral laws raise concerns under the Establishment Clause.[75] The issue is whether it is appropriate for the government to hold nonreligious individuals accountable under such laws when religious individuals receive preferential treatment.

It is true that neither the Establishment Clause nor Article III is explicitly invoked in *Smith* as a basis for the Court's observations about institutional limitations. However, those who would argue that Congress can override a mere prudential ex-

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73. *See* Baker v. Carr, 369 U.S. 186, 208 (1962) (stating that the absence of judicially discoverable or manageable standards indicates that a case is a nonjusticiable political question); *see also* Council on the Role of the Courts, THE ROLE OF COURTS IN AMERICAN SOCIETY 101-20 (Jethro K. Lieberman ed., 1984) (discussing the parameters of judicial competence). *See also*, Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 759-62 (1992) (exploring the relationship between *Smith* and justiciability principles, including the political question doctrine).

74. *See, e.g.*, Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674-75 (1980) (arguing that the Court's tests for interpreting the religion clauses provide no guidance and conflict with the constitutional text); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 115-17 (1992) (describing confusion in existing religion clause doctrine); Michael S. Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993) and Daniel O. Conkle, Lemon *Lives*, 43 CASE W. RES. L. REV. 865 (1993) (presenting competing perspectives on the *Lemon* test).

75. *See, e.g.*, Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting); Sherbert v. Verner, 374 U.S. 398, 415 (1963) (Stewart, J., concurring); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (finding that property tax exemptions for religious organizations raised establishment clause issue, but ultimately affirming their constitutionality); *see also*, Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989-90).

pression of the Court's views would do well to consider the many cases in which the Court has restrictively defined its own jurisdiction (based at least in part on competence concerns) and articulated a constitutional basis for its position at a later time.

For example, the Court has refused, in an unbroken series of cases dated from 1849, to resolve claims brought under the Guarantee Clause.[76] The Constitution expressly guarantees a republican form of government to the states.[77] These cases are deemed to present nonjusticiable political questions due to the perceived lack of judicially manageable standards for their resolution.[78] In these decisions, the Court defines the institutional limits of the federal judicial power without a clear constitutional mandate.[79] Moreover, the Guarantee Clause cases demonstrate that the Court has flatly refused to enforce an enumerated constitutional right. This is, on its face,[80] a more troubling reservation of the judicial power than the limiting construction of the free exercise right that occurred in *Smith*.

The political question doctrine as a whole, including but not limited to the Guarantee Clause and apportionment decisions, may provide the most straightforward example available of institutional concerns as a driving force in the Court's jurisprudence. Where a dispute is deemed to be "textually committed to a coordinate political department,"[81] or where "judicially discoverable and manageable standards for resolving the controversy are lacking,"[82] then the Court will dismiss the proceedings as in-

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76. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (declaring cases brought under the guarantee clause nonjusticiable).

77. U.S. CONST., art. IV, § 4.

78. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 208 (1962) (malapportionment cases brought under Equal Protection Clause are justiciable; provides classic formulation of political question doctrine).

79. *Luther* does not turn on Article III, but instead holds that the power to recognize a republican form of government rests with the legislature, which can delegate that power to the executive. 48 U.S. (7 How.) at 42-44.

80. This effect was mitigated somewhat by *Baker*, 369 U.S. at 207-09, in which the Court decided that malapportionment cases were justiciable when brought pursuant to the Equal Protection Clause of the Fourteenth Amendment.

81. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 518 (1969) (qualifications of members of Congress not a political question despite provisions of Article I, § 5); INS v. Chadha, 462 U.S. 919, 940-43 (1983) (constitutionality of legislative veto not a political question despite grant of power to Congress to establish uniform rules regarding naturalization).

82. *Chadha*, 462 U.S. at 941 (quoting Baker v. Carr, 369 U.S. at 217); *see also* Coleman v. Miller, 307 U.S. 433, 453-54 (1939) (issue of time limits for state ratification of a constitutional amendment presents a political question, in part due to the absence of satisfactory criteria for judicial determination).

volving a nonjusticiable political question. The political question doctrine is not derived from the "case or controversy" requirement of Article III;[83] thus its constitutional pedigree is open to challenge. It may be based on separation of powers; alternatively, it may be intended to preserve judicial capital and limit the influence of an unelected judiciary in a democratic society.[84]

The *Pullman* abstention doctrine[85] also reflects judicial concerns about competence. *Pullman* requires federal courts to refrain from deciding cases that turn on an unclear issue of state law when resolution of the state issue by a state court might make the federal court's ruling on federal or constitutional issues unnecessary.[86] Abstention is rooted in considerations of federalism and comity, and lacks an independent constitutional basis.[87] It is also premised on concerns about the competence of the federal judiciary when resolving unclear questions of state law.

The Court has previously professed incompetence in cases involving free exercise rights.[88] The church property cases, beginning in 1872 with *Watson v. Jones*,[89] epitomize the Court's institutional reluctance to resolve certain types of intra-church controversies. In *Watson*, the Court refused to resolve a property dispute between competing factions of the Presbyterian Church. Since *Watson* antedated judicial recognition of the concept of selective incorporation,[90] this rule was not initially predicated upon the First Amendment.[91] The Court continues to dismiss reli-

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83. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.62, at 148 (2d ed. 1994) (describing political question doctrine as "not derived from Article III").

84. *Id.*

85. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (establishing the abstention doctrine).

86. *See generally* CHEMERINSKY, *supra* note 83, § 12.2, at 687 (discussing *Pullman* abstention).

87. *Id.* at 688-91. It has been argued that abstention itself violates the separation of powers doctrine, on the grounds that judges are usurping the legislative function. *See generally* Martin H. Redish, *Abstention, Separation of Powers and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76 (1984).

88. In addition to the church property cases, various free exercise decisions have noted that courts are not competent to act as "arbiters of scriptural interpretation." *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation"); United States v. Lee, 455 U.S. 252, 257 (1982) (same).

89. 80 U.S. (13 Wall.) 679 (1871) (refusing to resolve a property dispute between national and local Presbyterian organizations).

90. *See, e.g.*, Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445 n.4 (1969).

91. Subsequent church property decisions have grounded this doctrine in the First Amendment. *See, e.g.*, Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952)

gious property disputes that cannot be resolved by resort to "neutral principles."[92]

The academic freedom doctrine, in which the Court defers to the autonomy of schools and universities across a wide variety of specific activities, also originated as a common law rule. One example of this doctrine is the issue of academic discipline. May a student who is dissatisfied with a grade challenge that grade in court? Early state cases show a consistent pattern of courts refusing to intervene in matters of student discipline.[93] Later cases grounded the academic freedom doctrine in the free speech guarantee of the First Amendment and extended it to prohibit states from requiring university faculty to disavow connections with the Communist Party.[94] While these two aspects of the academic freedom doctrine are distinct, the pattern again demonstrates a common-law tradition of deference to university autonomy evolving into a view that such deference was compelled, in certain cases, by the First Amendment.

More recent examples are also available. In 1992, the Court refused—on separation of powers grounds—to effectuate an explicit congressional authorization of citizen standing intended to permit interested parties to challenge the legality of agency decisionmaking.[95] Prior to *Lujan*, most court observers viewed

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(ruling that disputes regarding clerical selection were immunized from judicial review by the Free Exercise Clause); *Presbyterian Church*, 393 U.S. at 440; Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 720 (1976) (state courts constitutionally barred from overturning decisions of church ecclesiastical court regarding internal matters of church governance).

92. Jones v. Wolf, 443 U.S. 595, 602 (1979) established that the Court may, consistent with the First Amendment, resolve church property disputes that turn on "neutral principles of law."

93. *See, e.g.*, Woods v. Simpson, 126 A. 882 (Md. 1924) (upholding right of college to refuse to enroll student based on prior disciplinary record); Carr v. St. John's Univ., 231 N.Y.S.2d 410 (N.Y. App. Div. 1962), *aff'd*, 235 N.Y.S.2d 834 (N.Y. 1962) (upholding dismissal of students from Catholic university based on participation in civil marriage ceremony); Anthony v. Syracuse Univ., 231 N.Y.S. 435 (N.Y. App. Div. 1928) (university attendance is a privilege that can be denied without an express reason); State *ex rel.* Sherman v. Hyman, 171 S.W.2d 822 (Tenn. 1942), *cert. denied*, 319 U.S. 748 (1943) (institution's right to discipline students will not be questioned absent arbitrary or unlawful action). *See generally* Stephen C. Veltri, *Free Speech in Free Universities*, 19 OHIO N.U. L. REV. 783 (1993) (summarizing common law development of academic freedom principles).

94. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967). Fifteen years earlier, the Court found no constitutional infirmity in an identical statute. *See* Adler v. Board of Educ., 342 U.S. 485, 496 (1952).

95. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (Congress cannot create a right to bring citizen suits to enjoin violations of the Endangered Species Act). *Lujan* demonstrated a Court restrictively defining its powers on several levels. Justice Scalia, in a portion of the opinion not joined by the majority, found that the

citizen suit provisions as a legislative mandate sufficient to override the "prudential" rule of standing prohibiting generalized grievances. But *Lujan*, quite unexpectedly, struck down the citizen suit provision on a constitutional basis, namely the injury-in-fact requirement of Article III.[96]

The point is clear. Critics of *Smith* who view the Court's institutional argument as "merely prudential," or "dicta," should be wary of overconfidence. By the time the constitutionality of RFRA reaches the Supreme Court, a constitutional foundation for that argument may well come into play.

Academic reaction to the Court's institutional argument in *Smith* has been mixed.[97] Professor Laycock argues that the Court's position is both incorrect (because of the ubiquitous use of balancing tests in other contexts) and illegitimate (because the Court employed "activist" means to achieve a "conservative" outcome and because conceptions of the judicial role cannot authorize a refusal to enforce enumerated constitutional rights).[98] Laycock also notes that the "parade of horribles" cited by Scalia is horrible, if at all, only because judges are responsible for awarding each of the hypothetical exemptions, not because of the actual result.[99]

This argument leads rather neatly to the conclusion that Congress "solved" the Court's institutional problem by passing RFRA.[100] Now that the Court is balancing pursuant to RFRA rather than the Constitution, responsibility for the outcome of judicial decisions is shared between Congress and the Court. If

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plaintiffs could not demonstrate redressability (an essential component of standing) because it was unclear that the agencies involved in the dispute would follow a judicial order. *Id.* at 2137.

96. *Lujan* is widely read as an unpersuasive effort to "constitutionalize" one of the prudential limits on standing, i.e., the prohibition on generalized grievances. Under this reading, *Lujan* is a separation of powers decision in which the Court unexpectedly locates a constitutional infirmity where there had previously been no more than a prudential limitation. While I do not agree with Scalia's opinion in *Lujan*, I find the case instructive for those inclined to underestimate the force of *Smith*'s institutional argument. *See generally* Cass Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 163 (1992) (arguing that *Lujan* lacks a constitutional foundation and is inconsistent with historical practice).

97. The largest part of the response has been critical. *See supra* note 34. But *Smith* has some defenders. *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

98. Laycock, *supra* note 43, at 30-39.

99. Laycock, *supra* note 43, at 30-39.

100. *1990 Hearings*, *supra* note 9, at 77-78 (Appendix 3—Letter to Chairman Don Edwards from Douglas Laycock) (Sept. 27, 1990).

Congress disagrees with the Court's interpretation of RFRA, the statute can be amended as necessary.

Professor Laycock also argues that the institutional view of *Smith* amounts to judicial abdication of the Court's role in enforcing the Constitution. He rejects the institutional argument because "the judicial role is defined by the Constitution; the Constitution is not defined by changing conceptions of the judicial role."[101]

This is a lovely chiasmus, but is misleading both as a critique of *Smith* and as a description of the judicial role. As noted previously, *Smith* did not find that enforcement of the Free Exercise Clause was inconsistent with the judicial role. The Court merely rejected the use of the compelling interest test and substituted a neutrality standard. Enforcement of the Free Exercise Clause continues under this new standard.[102] Thus, it is hardly fair to accuse the *Smith* Court of retreating from its obligation to construe and enforce the Free Exercise Clause; the decision did precisely that.

Even more fundamentally, constitutional interpretation is the cornerstone of the judicial role. But it is the constitutional text that is binding, not judicial constructions thereof. The compelling interest test was created by the Court, not the founding fathers. To say that considerations of the judicial role, or of judicial competence, should play no part in constitutional interpretation is to place *Dred Scott* on the same footing as the Fourteenth Amendment. Judicial rules for enforcing constitutional commands are important, but to suggest that judges lack the authority to modify them is to unduly confine judicial prerogative.

A more troubling argument is that the Court's institutional judgment is limited to its context, namely defining the contours of exemptions from facially neutral laws mandated by the Free Exercise Clause.[103] Under this view, *Smith* rejected the compelling interest test because the resulting exemptions would impose a greater burden on government than the Constitution requires.

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101. Laycock, *supra* note 43, at 38-39.

102. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217 (1993) (applying *Smith* rule to strike down ordinances prohibiting animal sacrifice).

103. There is language in the opinion to support this reading. At one point, in rejecting the compelling interest test, the Court says: "We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges." *Smith*, 494 U.S. at 885. Later, the Court concludes the section by stating: "The First Amendment's protection of religious liberty does not require this." *Id.* at 889.

Once again, this argument supports the conclusion that Congress solved the Court's institutional problem by grounding the compelling interest test in a statutory right independent of the Constitution.

However, there is a problem with limiting the institutional argument in *Smith* to its context. Such a limitation means that the Court is institutionally competent to apply the compelling interest test pursuant to a federal statute, yet institutionally incompetent to do so pursuant to clear and applicable constitutional precedent.

If this is true, then *Smith* is indeed the absurd decision its critics claim. The First Amendment explicitly guarantees free exercise rights, so a reading of *Smith* that suggests the Court was seeking more explicit legislative authority to support its use of the compelling interest test (as in *Finley*)[104] renders the First Amendment superfluous and turns the Supremacy Clause on its head. Only if *Smith* is read as a declaration of judicial incompetence to balance religious freedom against neutral government interests, regardless of whether those liberties are enshrined in the Constitution or a federal statute, does the decision acquire a claim to coherence.

Once *Smith* is read in a manner that accords the institutional claim its full force, the infirmities of RFRA are apparent. The legislature cannot by fiat prescribe judicial competence where it is otherwise lacking and Congress makes no effort to do so in RFRA. The Findings of Fact and Statements of Purpose are silent on this issue,[105] and the legislative history suggests that neither the House nor the Senate seriously considered the competence problem.

Professor Laycock and others have pointed out that the Court's characterization of *Yoder*[106] and *Pierce*[107] as "hybrid" cases is both unconvincing and disturbing.[108] Since the "hybrid" interest in both decisions is produced by the combination of enumerated and unenumerated[109] rights, privileging combined

104. *Finley v. United States*, 490 U.S. 545 (1989). *Finley* creates no such difficulties, because there is nothing in either Article III or the Federal Tort Claims Act that explicitly guarantees the rights of pendent parties to be heard in a federal forum.

105. *See* 42 U.S.C. § 2000bb(a), (b) (Supp. V 1993).

106. Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting Amish children from compulsory school attendance).

107. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (upholding right of parents to send children to private schools).

108. Laycock, *supra* note 43, at 37; Gordon, *supra* note 34, at 98.

109. The unenumerated right in both cases is characterized in *Smith* as the

claims over those involving free exercise rights alone has the effect of making "unenumerated rights superior to enumerated ones."[110]

Smith's critics are clearly correct in this assertion. But Scalia's use of "hybrid rights" as an unartful tool to distinguish troubling precedent simply does not weaken the force of the Court's institutional argument. The fact that the Court draws its boundaries illogically does not mean that its power to establish those boundaries is suspect, any more than the Court's misguided application of standing principles in *Lujan*[111] vitiates the entire doctrine of standing.

A literary analogy may be of use. Consider the captain of a seagoing vessel. It has been argued that captains possess at least two kinds of authority.[112] The first is *de jure* authority based on a commission or some other source of official status—another way of saying that a captain has the power to command the ship because she is the captain. The second source of authority is based on the captain's personal experience and seamanship.

If we consider Justice Scalia as temporary captain[113] of the judicial ship, we find that he clearly has a "commission," based on existing constitutional precedent, to apply the compelling interest test in *Smith*. He refuses to do so, not only in that particular case, but in *any* case where religious freedom must be balanced against facially neutral laws. He does so because he finds that judges lack the seamanship to safely accomplish the task.

RFRA provides the Court with a second "commission" to balance facially neutral laws against religious liberty claims. But the commission is legislative—by definition less authoritative than the language and precedent of the Constitution—and RFRA has no effect on judicial seamanship. RFRA instructs judges to sail into waters where the Supreme Court has sailed before—and found impassable reefs.

"right of parents . . . to direct the education of their children." *Smith*, 494 U.S. at 881 (citations omitted).

110. Laycock, *supra* note 43, at 37.

111. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (striking down citizen suit provisions of the Endangered Species Act based on separation of powers).

112. GREG DENING, MR. BLIGH'S BAD LANGUAGE: PASSION, POWER AND THEATRE ON THE BOUNTY 21-22, 80 (1992).

113. I intend no extended comparison between Justice Scalia and the infamous Captain Bligh. The analogy merely provides a literary perspective on authority versus institutional competence.

V. CONGRESS, THE SUPREME COURT AND INDIVIDUAL LIBERTIES

Much of the current academic debate regarding RFRA's constitutionality turns on the scope of congressional power to enforce the guarantees of the Fourteenth Amendment.[114] While the extent of congressional authority to enact RFRA is an important issue, I believe the separation of powers inquiry is an independent measure of the statute's constitutional status.

Nonetheless, the cases involving congressional power under the Fourteenth Amendment are relevant here for another reason. Supporters of RFRA have routinely offered these cases as analogies to RFRA; proof that Congress has routinely acted in a way to protect individual liberties that the Court has not protected on its own initiative.[115] Since I view these cases as clearly distinguishable from RFRA, a brief overview is in order.

RFRA is not the first congressional foray into the field of individual rights that appears to conflict with a previous constitutional decision.[116] Congress has previously attempted—with mixed results—to legislate individual rights that the Court has found unprotected by the Constitution. On one level, the question of whether Congress may enact legislation that "broadens" the scope of a constitutional provision is as old as *Marbury v. Madison*.[117] But *Marbury* tells us only that Congress cannot expand the Supreme Court's original jurisdiction; the issue of when and how Congress can "second guess" the Court on consti-

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114. *See supra* note 18; *see also* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 245-52 (arguing that RFRA is within the scope of congressional power to enforce the Fourteenth Amendment); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 301, 362-68 (1994).

115. *See* Laycock, *supra* note 114.

116. For example, Congress recently "overruled" Supreme Court interpretations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, by amending the relevant provisions of the statute. *See* Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 107 (codified as amended in scattered sections of 2 U.S.C., 19 U.S.C., & 42 U.S.C.) (arguably reversing five Supreme Court decisions). Congress' power to reverse the Court on issues of statutory interpretation has been thoughtfully evaluated in the scholarly literature. *See, e.g.*, William Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991); Michael E. Solomine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992). Because the statutory interpretation function is distinct from the Court's power to construe the Constitution, these legislative initiatives do not present a separation of powers problem and will not be discussed in this article.

117. 5 U.S. (1 Cranch) 137 (1803) (holding that Congress cannot expand original jurisdiction of Supreme Court).

tutional questions continues to recur in a variety of intriguing contexts.

The 1960s and 1970s remain the high water mark in the ongoing dialogue between Congress and the Court on the scope of individual liberties. Voting rights[118] and criminal procedure[119] were topics of judicial and legislative concern during that era, as the Court considered the ramifications of the Voting Rights Act and Congress responded to a series of Warren Court decisions expanding the scope of procedural rights available to criminal defendants.[120]

The leading voting rights decision, which some view as resolving the question of whether Congress can prohibit practices that the Court has held constitutionally permissible, is *Katzenbach v. Morgan*.[121] In *Morgan*, New York officials were enjoined from enforcing a state law that required voters educated in Puerto Rico to establish their literacy in English. The injunction was based on section 4(e) of the Voting Rights Act, which broadly prohibited the use of literacy tests. Seven years earlier, prior to the enactment of the Voting Rights Act, the Court sustained a South Carolina law requiring voters to prove their literacy as consistent with the Fourteenth and Fifteenth Amendments.[122] *Lassiter* held that no constitutional violation exists absent proof that a literacy test has been discriminatorily applied.[123]

Justice Brennan, writing for the majority in *Morgan*, found that the Voting Rights Act passed constitutional muster even though it prohibited a state practice that probably would survive constitutional scrutiny under *Lassiter*. In effect, the Court found that Congress, acting pursuant to Section 5 of the Fourteenth Amendment, could prohibit state conduct that the Fourteenth Amendment did not prohibit of its own force.

In a much discussed footnote to *Morgan*,[124] Justice Brennan attempted to confine the contours of this newly recognized congressional power. In this footnote, Brennan suggested

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118. *See infra* text accompanying notes 121-29.

119. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (establishing rules governing criminal confessions); Mapp v. Ohio, 367 U.S. 643 (1961) (excluding evidence obtained through an unlawful search or seizure).

120. *Compare Miranda*, 384 U.S. 436 *with* 18 U.S.C. § 3501 (1968).

121. 384 U.S. 641 (1966).

122. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

123. *Id.* at 53-54.

124. *Morgan*, 384 U.S. at 651 n.10; Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 247-61 (1971).

that Congress could "enforce" the scope of Fourteenth Amendment rights, but could not "restrict, abrogate or dilute" those rights.[125] This has been characterized as the "one way ratchet" argument,[126] and its force has been widely disputed.[127]

In *Oregon v. Mitchell*,[128] Justice Brennan's views evolved a step further. In an opinion joined by only two other Justices, he hinted that Congress might have the power, again acting under Section 5, to dilute constitutional rights that the Court had previously recognized where Congress was to "unearth new evidence" while exercising its special competence in fact-finding.[129] Under this theory, Congress may statutorily require either more or less protection for a constitutional right than the Constitution, as interpreted by the Court, requires. While the scope of this theory provides Congress with ample authority to enact RFRA, it has never commanded the support of a majority of the Court.

The Supreme Court's latest pronouncement on the extent of the "*Morgan* power" came in the affirmative action context. In *Metro Broadcasting, Inc. v. F.C.C.*,[130] the Court upheld minority preferences in the awarding of radio licenses without a finding of past discrimination.[131] The Court made clear that Congress can, acting under Section 5, institute racial preferences even where such measures were not constitutionally required.[132]

It is also worth considering several bills that, while never enacted,[133] have been introduced and debated in Congress. Each would have the effect of expanding, and in some cases contracting, the scope of constitutional rights previously an-

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125. *Morgan*, 384 U.S. at 651 n.10.

126. *See, e.g.*, Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1230-39 (1978); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606-09 (1975); Stephen L. Carter, *The* Morgan *"Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 830-34 (1986).

127. *See, e.g.*, Cox, *supra* note 124, at 247-61. Justice Harlan also questioned the force of the "one-way ratchet theory" in his dissent in *Morgan*, 384 U.S. at 668.

128. 400 U.S. 112 (1970).

129. *Mitchell*, 400 U.S. at 249 n.31.

130. 497 U.S. 547 (1990) (holding that Congress, but not state and local governments, may authorize preferences for racial minorities without a finding of past discrimination).

131. *Metro Broadcasting*, 497 U.S. at 569-70.

132. *See also* Fullilove v. Klutznick, 448 U.S. 448 (1980); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The issue raised by the dissenters in the affirmative action cases is whether certain racial preferences may themselves violate the Equal Protection Clause.

133. Since they have never been enacted, these bills have not been challenged on separation of powers or any other grounds.

nounced by the Court. The Human Life Bill,[134] first introduced in the 97th Congress, provided that human life begins at conception. This bill would have expanded the rights of the unborn and the correlative power of states to enact laws protecting fetal life. The bill would have simultaneously limited the constitutional right of women to terminate a pregnancy, a right established by *Roe v. Wade*[135] and recently reaffirmed in *Planned Parenthood v. Casey*.[136] The Human Life Bill has never progressed to a floor vote.

An alternative bill, the Freedom of Choice Act (FOCA),[137] was introduced in the 102d Congress. This bill would expand the scope of a woman's privacy rights with regard to an unborn child beyond the level that the Court is currently prepared to recognize as compelled by the Constitution. While the FOCA does not raise a serious concern under Justice Brennan's "one-way ratchet" theory,[138] it nevertheless represents a congressional effort to provide greater protection for a woman's right to terminate her pregnancy than the Supreme Court's current "undue burden" test.[139]

The controversial Racial Justice Act[140] was introduced in the 102d Congress as well. It would extend the right of equal protection to permit defendants on death row to use statistical evidence to demonstrate that capital punishment was unlawfully administered on the basis of their race. Such a right is not currently recognized in the Court's equal protection jurisprudence.

RFRA is distinctly different from each of these other congressional forays into the field of individual rights. Both RFRA and the aforementioned legislative initiatives represent the congressional perspective on the appropriate scope of a constitutional right. In each instance, the congressional perspective differs from the considered judgment of the Court. However, none of the other legislative undertakings, whether proposed or enacted,

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134. S. 158, 97th Cong., 1st Sess. (1981).

135. 410 U.S. 113 (1973).

136. 112 S. Ct. 2791 (1992)

137. S. 25, 102d Cong., 2d Sess. (1992).

138. In the final Senate Report on the FOCA, it was argued that FOCA does not "restrict, abrogate or dilute" any Constitutional guarantee. S. REP. NO. 42, 103d Cong. 1st Sess. (1991). This view assumes that neither a parent nor the state have any constitutional interest in protecting the life of the unborn.

139. *Casey*, 112 S. Ct. at 2821 (substituting an "undue burden" test for the "strict scrutiny" approach used by *Roe* to evaluate the constitutionality of state restrictions on abortions).

140. S. 1249, 102d Cong., 1st Sess. (1991).

threatens the Court's determination of its institutional capabilities. For this reason, none of these bills triggers the separation of powers problem of RFRA.[141] RFRA is, quite simply, unique in that it denies the right of the Court to establish the limits of the judicial function.

VI. THE LIMITS OF LITERALISM

It may reasonably be asked whether there is any natural limit to the capacity of the judiciary—or the legislative and executive branches—to declare their incompetence in a particular subject area. Can the President declare himself incompetent to execute laws regarding desegregation of schools? Can the judiciary proclaim itself incapable of determining when a set of facts amounts to an unlawful restraint upon trade, in violation of the Sherman Act? Can the Court declare itself unable to determine what constitutes an unreasonable search and seizure?

I believe there are limiting principles available. The Court cannot refuse to enforce an explicit provision of the Constitution. As noted earlier, *Smith* did not attempt to follow any such course. Rather, the Court proclaimed its inability to apply and enforce the compelling interest test pursuant to the Free Exercise Clause, and substituted a neutrality standard.[142] Since the *Smith* decision, the Court has reaffirmed that the Free Exercise Clause prohibits a state from enacting laws that discriminate against a particular religion.[143]

The neutrality standard established by *Smith* and reaffirmed in *Lukumi Babalu Aye* is certainly less protective of religious liberty than the compelling interest test. The inadequacy of the new standard as a measure of religious freedom has been persuasively argued.[144] Nevertheless, those facts are simply insufficient to compel the conclusion that the Court is no longer enforcing the Free Exercise Clause. The Court has merely interpreted the clause more narrowly than before, relying on institutional limitations.

If the Court proclaimed itself incapable of enforcing the

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141. The bills in question may raise other constitutional difficulties. The Human Life Bill certainly runs afoul of Justice Brennan's one-way ratchet; thus, to the extent that theory can command a majority of the Court, the bill may exceed the scope of congressional power under Section 5 of the Fourteenth Amendment.

142. *Smith*, 494 U.S. at 890.

143. Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2234 (1993).

144. *See supra* note 34.

Sherman Act on the grounds that no appropriate limiting principle could be found to separate lawful restraints of trade from unlawful combinations, then the outcome would be different. Congress could then redraw the contours of the statute in order to make the law more susceptible to judicial enforcement and interpretation. Congress cannot, however, redraft the statute to incorporate a prior constitutional standard that the Court once used but has since rejected as unworkable. This is what Congress has done in the course of enacting RFRA.

Congress undoubtedly has the power to limit the Court's prudential doctrines. The Judicial Improvements Act of 1990 is a permissible response to *Finley*, and Congress could override other Court decisions that turn on the interpretations of jurisdictional statutes.[145] Congressional overrides to prudential doctrines such as abstention are more problematic, but the legislature probably retains the power to restrict or abolish such judge-made principles, for their relationship to judicial competency is more attenuated than the claim made in *Smith*.

Congress' exercise of its "*Morgan* power" is also restricted by the Constitution. This suggests that the church property cases and other examples of judicial "incompetence" that are based upon (or have acquired) a firm constitutional footing cannot be legislatively overridden.

It may be helpful to distinguish a slight variation on RFRA. The Supreme Court has held that aliens interdicted upon the high seas are not entitled to due process protection, unlike aliens who have gained entry to the United States.[146] Let us conjecture an unlikely scenario in which Congress responds to the Haitian exodus by enacting a "Refugee Act." The Act specifically grants aliens seeking admission to the United States a uniform level of due process protection, regardless of whether they have physically gained "entry" to the country. The specific type of due process required is not enumerated; instead, reference is made to prior Supreme Court decisions providing certain due process protections to aliens physically present in the United States.

Like RFRA, the new Refugee Act would, in practical terms,

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145. *See, e.g.*, Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992) (finding that domestic relations cases are an exception to the statutory grant of diversity jurisdiction). As Justice Blackmun noted, there is no coherent construction of the diversity statute that supports a domestic relations exception; the Court's decision properly rests on "longstanding [federal] practice." *Id.* at 2217 (Blackmun, J., concurring).

146. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 547 (1950); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

reverse the effect of previous Supreme Court decisions. Like RFRA, the statute would result in more people being entitled to claim rights enumerated in the Constitution, even though the refugees' claims would be based on both constitutional and statutory grounds. However, the Refugee Act would raise no separation of powers problem. Like the Voting Rights Act and the other bills discussed in Part V of this article, the Refugee Act presents no challenge to the judicial competence. Judges need only apply a test, with which they are already familiar, to a larger group of persons.

This distinction from RFRA is critical. The Court has never found the due process tests to be beyond the judicial competence, either as applied to nonresident aliens, or in any other context. Since the test for due process is within the judicial competence, Congress can lawfully expand the number of persons subject to the test. Once the test at issue has been rejected on institutional grounds, however, as the compelling interest test was in *Smith*, Congress cannot force the Court to return to its prior standard.

VII. CONCLUSION

The institutional argument should be recognized as the single most defensible basis for the *Smith* decision. Because of its troubling implications, it is also the most tempting aspect of *Smith* to disregard. Previous critiques of *Smith* have failed to develop the institutional argument, and thereby deprive it of its true force.

If the Court's rhetoric on institutional competence is taken seriously, then RFRA cannot be sustained. By directing the courts to apply the compelling interest test in the free exercise context, RFRA presumes judicial competence to perform that task. The subtext of *Smith* denies that competence. This article has suggested that the institutional argument is based on legitimate concerns and may be supported by a constitutional foundation, thus meeting the claim that Congress can override prudential expressions of judicial incompetence. Because RFRA denies the Court an essential and fundamental right—the right to determine the boundaries of judicial capacity—the statute violates separation of powers.